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# CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF TORTURE AND DETENTION

## Report of the Working Group on Arbitrary Detention

GE.98-05252 (E)

CONTENTS


| | Paragraphs | Page |
|---|---|---|
| Introduction | 1 | 3 |
| I. ACTIVITIES OF THE WORKING GROUP | 2 - 61 | 3 |
| A. Handling of communications addressed to the Working Group | 2 - 18 | 3 |
| B. Country missions | 19 - 36 | 10 |
| C. Cooperation with the Commission on Human Rights | 37 - 51 | 13 |
| D. The mandate of the Group | 52 - 61 | 16 |
| II. SITUATION REGARDING IMMIGRANTS AND ASYLUM SEEKERS | 62 - 70 | 18 |
| A. Scope | 64 - 68 | 18 |
| B. Criteria for determining whether or not the custody is arbitrary | 69 - 70 | 19 |
| III. CONCLUSIONS AND RECOMMENDATIONS | 71 - 80 | 20 |
| A. The specificity of the Group's mandate | 71 - 75 | 20 |
| B. Immigrants and asylum seekers | 76 - 78 | 21 |
| C. Military justice | 79 - 80 | 21 |
| Annex | | |
| Statistics | | 23 |

## Introduction

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. Commission resolution 1997/50 spells out the revised mandate of the Group, which is to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by local courts in conformity with domestic law, with the standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned. The Working Group is composed of the following five independent experts: Mr. R. Garretón (Chile); Mr. L. Joinet (France); Mr. L. Kama (Senegal); Mr. K. Sibal (India); Mr. P. Uhl (Czech Republic and Slovakia). At its eighteenth session (in May 1997), the Group, at the proposal of its Chairman, Mr. Joinet, decided to amend its methods of work to the effect that at the end of each mandate the Chairman and the Vice-Chairman of the Group should resign, and an election be held to replace them. In pursuance of this amendment, the Group elected Mr. K. Sibal as Chairman-Rapporteur and Mr. L. Joinet as Vice-Chairman. The Group has so far submitted seven reports to the Commission, covering the period 1991-1998 (E/CN.4/1992/20, E/CN.4/1993/24, E/CN.4/1994/27, E/CN.4/1995/31 and Add.1-4, E/CN.4/1996/40 and Add.1, E/CN.4/1997/4 and Add.1-3, and E/CN.4/1998/44 and Add.1-2). The Working Group's initial three-year mandate was first extended by the Commission in 1994; in 1997 it was extended for another three years.

## I. ACTIVITIES OF THE WORKING GROUP

2. The present report covers the period from January to December 1998, during which the Working Group held its twenty-first, twenty-second and twenty-third sessions.

### A. Handling of communications addressed to the Working Group

#### 1. Communications transmitted to Governments and currently being dealt with

3. During the period under review, the Working Group transmitted 32 communications concerning 135 new cases of alleged arbitrary detention (12 women and 123 men) involving the following countries: Bahrain (one communication - 1 case); Cameroon (one communication - 1 case); Chad (one communication - 1 case); Egypt (two communications - 2 cases); Equatorial Guinea (one communication - 1 case); Ethiopia (three communications - 39 cases); India (one communication - 5 cases); Indonesia (two communications - 15 cases); Israel (two communications - 2 cases); Myanmar (one communication - 14 cases); Mexico (one communication - 1 case); Nigeria (two communications - 28 cases); Palestine (two communications - 3 cases); People's Republic of China (three communications - 4 cases); Philippines (one communication - 1 case); Russian Federation (one communication - 1 case); Tunisia (one communication - 1 case); Turkey (two communications - 9 cases); United States (two communications - 4 cases); Viet Nam (two communications - 2 cases).

4. Out of the 19 Governments concerned, the Governments of the following 12 countries provided information on all or some of the cases transmitted to them: Bahrain, China (reply to one communication), Egypt (reply to one communication), Ethiopia (reply to two communications), India, Indonesia (reply to one communication), Mexico, Palestine, the Philippines, Turkey, the United States of America (reply to one communication) and Viet Nam.

5. Apart from the above-mentioned replies, the Government of Indonesia communicated information concerning cases on which the Group had already adopted opinions.

6. The Governments of Cameroon, Chad, Israel, Myanmar, Nigeria and the Russian Federation did not provide the Working Group with any reply concerning cases submitted to them, although the 90-day deadline had expired. With regard to four communications, concerning Equatorial Guinea, the People's Republic of China, Palestine and Viet Nam, the 90-day deadline had not yet expired when the present report was adopted by the Group.

7. A description of the cases transmitted and the contents of the Governments' replies will be found in the relevant decisions and opinions adopted by the Working Group (E/CN.4/1999/63/Add.1).

8. With regard to the sources which reported alleged cases of arbitrary detention to the Working Group, of the 135 individual cases submitted by the Working Group to Governments during the period under consideration, 6 were based on information communicated by the detained persons themselves or by members of their families or relatives, 56 on information communicated by local or regional non-governmental organizations, 59 on information provided by international non-governmental organizations enjoying consultative status with the Economic and Social Council and 14 on information provided by the United Nations Development Programme.

## 2. Opinions of the Working Group

9. It is recalled that the Working Group, in order to avoid any controversy over the interpretation of its mandate, decided to refer to its conclusions on individual cases submitted to it as "opinions" and no longer as "decisions", as of its eighteenth session, in May 1997.

10. During the first two sessions in 1998, the Working Group adopted 21 opinions concerning 92 persons in 15 countries. Some details of the opinions adopted at those sessions are provided in the table below. The complete text of opinions 1/1998 to 21/1998 can be found in Addendum 1 to the present report. The table also includes some details of the opinions adopted at the Working Group's twenty-third session which could not, for technical reasons, be included in an annex to the report.

11. In accordance with its methods of work (E/CN.4/1998/44, annex I, para. 18), the Working Group, in addressing its opinions to Governments, drew their attention to Commission resolution 1997/50 requesting them to take account of the Working Group's views and, where necessary, to take appropriate

steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they had taken. On the expiry of a three-week deadline the opinions were also transmitted to the source.

Opinions adopted during the twenty-first to twenty-third sessions of the Working Group on Arbitrary Detention

| Opinion No. | Country | Reply from the Government | Person(s) concerned | Opinion |
|---|---|---|---|---|
| 1/1998 | Cuba | Yes | Félix A. Bonne Carcasés; René Gómez Manzano; Vladimiro Roca Antunes; María Beatriz Roque Cabello | Arbitrary, category II |
| 2/1998 | United Arab Emirates | Yes | Elie Dib Ghaled | Arbitrary, categories I and II; in respect of sentence to corporal punishment, matter referred to Special Rapporteur on torture. |
| 3/1998 | Eritrea | No | Ruth Simon | Arbitrary, category III |
| 4/1998 | Maldives | No | Wu Mei De | Arbitrary, category III |
| 5/1998 | Ethiopia | No | Abdella "Mazagaja" Ahmed Teso | Arbitrary, category II |
| 6/1998 | Bahrain | Yes | Jaffer Haj Mansur Al-Ekry; Ali Mohamed Ali Al-Ekry; Mahdi Mohamed Ali Al-Ekry and Hussain Mohamed Ali Al-Ekry | Arbitrary, category III, for Ali Mohamed Ali Al-Ekry and Mahdi Mohamed Ali Al-Ekry; Kept under review for Jaffer Haj Mansur Al-Ekry; Filed for Hussain Mohamed Ali Al-Ekry |
| 7/1998 | Viet Nam | No | Ngoc An Phan and Buu Hoa Ho | Arbitrary, category II |

| Opinion No. | Country | Reply from the Government | Person(s) concerned | Opinion |
|---|---|---|---|---|
| 8/1998 | Israel | No | Abbas Hasan 'Abd al Husayin Surur and 21 others* | Arbitrary, category I (with regard to Lebanese nationals transferred to Israel and kept detained after expiry of sentences);<br><br>Arbitrary, category III (for Lebanese nationals transferred to Israel and placed in administrative detention without charge or trial). |
| 9/1998 | Israel | No | Hasan Fataftah, Samir Shallaldah, Usama Barhan, Nasser Jarrar and Suha Bechara | Arbitrary, category III |
| 10/1998 | Israel | No | Ribhi Qattamesh, Imad Sabi and Derar Al Aza | Arbitrary, category III |
| 11/1998 | Israel | No | Bassam 'AbuAqr, 'Abd Al-Rahman 'Abd Al-Ahmar, and Khaled Deleisheh | Arbitrary, category III |
| 12/1998 | Indonesia | No | Adnan Beuransyah | Arbitrary, category II |
| 13/1998 | Bhutan | Yes | Taw Tshering, Samten Lhendup, Tshampa Wangchuk and Shampa Ngawang Tenzin | Arbitrary, category II |
| 14/1998 | Republic of Korea | Yes | Kim Yong and Suh Joon-Shik | Victims released; case filed |
| 15/1998 | Yugoslavia | Yes | Avni Klinaku and 17 others* | Case filed provisionally |
| 16/1998 | Palestine | Yes | Shafeq Abd Al-Wahab | Case transmitted to Working Group on Enforced or Involuntary Disappearances |

| Opinion No. | Country | Reply from the Government | Person(s) concerned | Opinion |
|---|---|---|---|---|
| 17/1998 | United Arab Emirates | No | George Atkinson | Arbitrary, category III |
| 18/1998 | Cuba | Yes | Lorenzo Paez Núñez | Kept pending; Government requested to provide additional clarification |
| 19/1998 | Mexico | No | Dante Alfonso Delgado Rannauro | Victim released, case filed |
| 20/1998 | Turkey | Yes | Nurdan Baysahan and 7 others* | Case kept pending |
| 21/1998 | Indonesia | Yes | Ratna Sarumpaet and 7 others* | Victims released, case filed |
| 22/1998 | Peru | No | Antero Gargurevich Oliva | Arbitrary, category III |
| 23/1998 | Pending. Not issued for technical reasons | | | |
| 24/1998 | Peru | No | Carlos Florentino Molero Coca | Arbitrary, category III |
| 25/1998 | Peru | No | Margarita M. Chuquiure Silva | Arbitrary, category III |
| 26/1998 | Peru | No | Lori Berenson | Arbitrary, category III |
| 27/1998 | Viet Nam | Yes | Doan Viet Hoat | Arbitrary, category II |
| 28/1998 | Mexico | Yes | José Francisco Gallardo Rodríguez | Arbitrary, category II |
| 29/1998 | Philippines | Yes | Leonilo de la Cruz | Victim released, case filed |

| Opinion No. | Country | Reply from the Government | Person(s) concerned | Opinion |
|---|---|---|---|---|
| 30/1998 | China | Yes | Zhou Guoqiang | Arbitrary, category II and III |
| 31/1998 | Cameroon | No | Pius Njawé | Arbitrary, category II |

* The complete list of the persons concerned is available for consultation with the secretariat of the Working Group.

Note: For technical reasons, opinions 22/1998 to 32/1998, adopted at the twenty-third session (on 3 and 4 December 1998), could not be reproduced in an annex to the present report. They will be reproduced in an annex to the next annual report.

### 3. Governments' reactions to opinions

12. Following the transmittal of its opinions, the Working Group received information from the Governments of the following countries with regard to the cases reported there (the opinion to which the information refers is given in parenthesis): Bahrain (6/1998), Cuba (1/1998), Peru (18/1997), United Arab Emirates (2/1998).

13. The above-mentioned Governments contest or challenge the conclusions reached by the Working Group. The Government of Bahrain affirms, in respect of opinion 6/1998, that the Working Group's opinion contains an erroneous assessment of the legal system applicable in Bahrain and is based on vague assumptions. It argues that the alleged victims (Jaffer Mansoor Mohamed Al-Akri, Mohamed Mehdi Mohamed Al-Akri and Ali Mohamed Ali Al-Akri) were detained in accordance with the law and on precise charges, that they were never denied the right to appeal against their detention, that they were not held incommunicado and that they were afforded all rights of visitation, legal representation and welfare. The Government of Peru, in its response to opinion 18/1997, argues that Gustavo Adolfo Cesti Hurtado was prosecuted and tried in strict accordance with applicable legal procedures and that, accordingly, his case is not one of arbitrary detention. It further contends that the physical, mental and moral health of Mr. Hurtado is fully ensured. The Government of the United Arab Emirates, in its response to opinion 2/1998, contends that the judgments against Elie Dib Ghaled were handed down in strict compliance with applicable domestic legislation and that he had full access to legal representation. The Government adds that given the independence of the judiciary, it cannot interfere with the judgments. By reference to the interpretation of its mandate, the Working Group has formulated its position on the note verbale of the Government of Cuba concerning opinion 1/1998 in chapter I.D of the present report.

14. The Governments of the following countries informed the Working Group of the release of the person(s) concerned: Bahrain (in respect of one of the

persons referred to in opinion 6/1998); Philippines (opinion 29/1998), Republic of Korea (opinion 14/1998); Indonesia (opinion 21/1998). The Working Group welcomes the release of these individuals.

### 4. Communications that gave rise to urgent appeals

15. During the period under review the Working Group transmitted 83 urgent appeals to 37 Governments (as well as to the Palestinian Authority) concerning 763 individuals. In conformity with paragraphs 22 to 24 of its revised methods of work, the Working Group, without prejudging whether the detention was arbitrary or not, drew the attention of each of the Governments concerned to the specific case as reported and appealed to it to take the necessary measures to ensure that the detained persons' right to life and to physical integrity was respected. When the appeal made reference, in accordance with the source, to the critical state of health of certain persons or to particular circumstances, such as failure to execute a court order for release, the Working Group also requested the Government concerned to undertake all the necessary measures to have them released without delay.

16. During the period under review, urgent appeals were transmitted by the Working Group as follows (the number of persons concerned by these appeals is given in parenthesis): 13 appeals to the Democratic Republic of the Congo (166); seven appeals to Nigeria (55); five to Turkey (5); four to Indonesia (7); four to the Sudan (48); four to Ethiopia (102); four to Israel (20); three to Sri Lanka (4); three to Mexico (12); two to Bahrain (20); two to Equatorial Guinea (2); two to Malaysia (28); two to Palestine (5); two to the Republic of Korea (11); two to Saudi Arabia (12); two to Tunisia (2); one to Australia; one to Bangladesh; one to Bhutan (1); one to Burundi (1); one to Egypt (1); one to El Salvador (1); one to Eritrea (72); one to the Gambia (1); one to Haiti (1); one to India (1); one to the Islamic Republic of Iran (1); one to Mauritania (3); one to Myanmar (55); one to Niger (26); one to the People's Republic of China (1); one to Peru (1); one to Tanzania (20); one to Thailand (46); one to Uganda (11); one to Viet Nam (1); one to Yemen (16); and one to the Federal Republic of Yugoslavia (1).

17. Of the above-mentioned urgent actions, 31 were urgent appeals put out by the Working Group jointly with other thematic or geographical special rapporteurs. These were addressed to the Governments of Bahrain (1), Bhutan (1), Burundi (1), Democratic Republic of the Congo (11), Egypt (1), Equatorial Guinea (1), Indonesia (2), Mexico (1), Nigeria (5), Palestine (1), Peru (1), Saudi Arabia (2), Sri Lanka (1), Sudan (3), Turkey (1) and Uganda (1).

18. The Working Group received replies to the urgent appeals it had addressed to the Governments of the following countries: Bhutan, El Salvador, Ethiopia (in respect of one urgent action), Indonesia, Malaysia, People's Republic of China, Peru, Saudi Arabia, Sri Lanka, Sudan, Thailand, Turkey (in respect of all five urgent actions), Viet Nam. In some cases, it was informed, either by the Government or by the source, that the persons concerned had never been detained or that they had been released, in particular in the following countries: Bhutan, El Salvador, Ethiopia, Indonesia (release of two individuals referred to in an urgent action

concerning three individuals and liberation of another individual); Sri Lanka, Sudan (release of the referred to in two urgent actions) and Turkey (release of two individuals covered by two urgent actions). In other cases (for example, those relating to Saudi Arabia, the Sudan, Thailand, Turkey and the Federal Republic of Yugoslavia), the Working Group was assured that the detained individuals would benefit from due process and fair trial guarantees. The Working Group wishes to thank those Governments which heeded its appeals and took the necessary steps to provide it with information on the situation of the persons concerned, and especially the Governments which released those persons.

## B. Country missions

### 1. Visits conducted in 1998

19. During the period under consideration, the Working Group visited Peru. Pursuant to the mandate established in Commission resolution 1997/50, paragraph 4, the Working Group also visited the United Kingdom and Romania. The report on the visit to Peru is contained in Addendum II to the present report. The reports on the visits to the United Kingdom and Romania are contained in Addendum III and Addendum IV, respectively.

20. Furthermore, two invitations have been extended to the Working Group for 1999:

> Indonesia: following a statement made by the Chairman of the fifty-fourth session of the Commission on Human Rights, on 24 April 1998, the Government of Indonesia extended an invitation to the Group to visit Indonesia prior to the fifty-fifth session of the Commission on Human Rights.
>
> Bahrain: during the fiftieth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Permanent Representative of Bahrain to the United Nations Office at Geneva stated that his Government had also agreed to extend an invitation to the Working Group on Arbitrary Detention for a preparatory visit to Bahrain, the date of which would be fixed in consultation with the Chairman of the Working Group (E/CN.4/Sub.2/1998/SR.25, para. 51).

At the time of adoption of the present report by the Working Group, the modalities of these visits were under negotiation with representatives of the Governments concerned.

### 2. Incidents linked to previous country visits by the Working Group

(a) Visit to China (11 October 1997; E/CN.4/1998/44/Add.2)

21. During its visit of Drapchi prison in Lhasa on 11 October 1997, an inmate in a pavilion visited by the Group shouted slogans in favour of the Dalai Lama. After interviewing this inmate, the Group asked the Chinese authorities for assurances that the inmate would not suffer any reprisals as a

result of his act; these assurances were given, in particular by Mr. Guangya, Director-General of the Department for International Organizations and Conferences.

22. Prior to the fifty-fourth session of the Commission on Human Rights, the Group received information that the inmate in question and other inmates had been subjected to beatings and intensive interrogation after the Working Group's visit. In a letter dated 25 March 1998, the Chairman of the Working Group requested clarification from the Chinese authorities. On 1 April 1998, the authorities replied that neither this inmate nor any other inmate at Drapchi prison had been beaten nor suffered any reprisals as a result of the interviews conducted by the Working Group.

23. In July 1998, the Working Group received precise and corroborated additional information confirming that the inmate interviewed on 11 October 1997, as well as two other inmates at Drapchi prison, had received extended prison sentences for their protests. On 27 July 1998, the Chairman of the Working Group requested additional clarification from the Chinese authorities in respect of these allegations.

24. By letter dated 17 September 1998, the Chinese authorities reaffirmed that neither the inmate interviewed by the Group nor any other inmate had suffered reprisals as a result of the interview of 11 October 1997. They added, however, that the inmate in question and two others had committed new offences, for which had been referred to the Intermediate People's Court in Lhasa for trial; the Court had decided to extend the sentences of those three individuals, who were currently serving their sentences. Given the gravity of the situation, the Working Group requested the Chinese authorities, on 18 September 1998, to provide specific information about the new offences said to have been the basis for the extended prison terms and about the inmates' right of appeal, as well as a copy of the verdict handed down by the Intermediate People's Court. By the end of its twenty-third session (4 December 1998), the Working Group had not received any response to its request for information.

25. In view of the foregoing, the Working Group finds the above-mentioned allegations to be sufficiently well-founded for the following reasons:

(a) The fact that the three inmates in respect of whom the Working Group had obtained assurances should be the same as those whose prison terms were later extended is a regrettable coincidence that cannot, as such, be contested;

(b) In this context, the Working Group strongly regrets that it was unable to obtain any reply from the Chinese authorities to its letter of 18 September 1998; it interprets this lack of a reply as being a consequence of the difficulty that the Chinese authorities have in persuading the Working Group in a credible manner that there was no causal relationship between the incident in question and the heavier prison sentences imposed on the three inmates;

(c) The Working Group is all the more concerned because it has the feeling that this is not an isolated incident; indeed, it has received

reliable information that a similar incident occurred during the visit to Drapchi prison by a delegation of senior Swiss officials in December 1991, when a prisoner who had voiced his support for the Dalai Lama had his prison term increased by eight years. Recently, other such incidents, also followed by reprisals, took place during the visit by a European Union delegation on 6 May 1998.

(b) Visit to Viet Nam (24-31 October 1994)

26. During the Working Group's stay in Ho Chi Minh City, the Chairman of the Working Group received at his hotel, in the presence of the Group's secretary, the monk Thich Khong Tanh, a member of the Unified Buddhist Church of Viet Nam, who had requested a meeting.

27. On account of the presence of individuals evidently instructed to keep a watch on visitors making contact with the Group, the interview was cut short. The monk at that point handed the Chairman an envelope containing a document entitled "Observations on the grave violations committed by the Vietnamese Communist Party against the people and against Buddhism in Viet Nam", which took the form of an open letter to the General Secretary of the Vietnamese Communist Party. On the eve of the delegation's departure, the Chairman was informed by a senior Vietnamese official that the transmittal of the document might jeopardize the mission by causing an incident at the airport that would involve a search.

28. The Chairman indicated that, in such an eventuality, he would comply with the formality, but pointed out that the Working Group would be bound to report the incident to the Commission on Human Rights, and added that he would check that the monk Thich Khong Tanh was not subjected to any reprisals. However, the Working Group later learnt that, according to the source of its information, Thich Khong Tanh had been arrested because of his meeting with the Working Group and, in particular, for the transmittal of the document.

29. Regarding this development as a matter for concern, the Working Group sought further information, in particular from the Permanent Mission of Viet Nam. The latter confirmed that Thich Khong Tanh had been arrested, but stated that the measure was not related to the Group's visit and that it concerned not only Thich Khong Tanh but a group of monks, of which he was a member, that had organized without permission a humanitarian relief operation for flood victims in the Mekong Delta. The group was said to have publicized its cause (with posters, banners, etc.) on that occasion, thereby undermining national unity and leading to proceedings being brought against them.

30. The Working Group sent an urgent appeal to the authorities on 19 January 1996 and then, having taken up the matter, issued opinion 7/1998 declaring the detention of the members of the group, including Thich Khong Tanh, to be arbitrary.

31. In the indictment issued by the Chairman of the People's Supervision and Control Bureau of Ho Chi Minh City (No. 18 KSDT-AN, dated 24 March 1995), Thich Khong Tanh is in fact accused of having sent such a document abroad, thus enabling it to be used by ill-intentioned organizations to defame the Party and the State of Viet Nam.

32. During his recent visit to Viet Nam, the Special Rapporteur on religious intolerance had a meeting with Thich Khong Tanh at reeducation camp Z30A in Xuan Loc; the monk confirmed that he had been arrested and placed in detention because of his religious beliefs and for having transmitted a document to the Working Group on Arbitrary Detention (see E/CN.4/1999/58/Add.2).

33. As a result of its investigations, the Working Group believes that the above facts have been sufficiently well substantiated to be brought to the attention of the Commission on Human Rights, bearing in mind that, in its resolution 1998/66, the Commission:

(a) Urged Governments to refrain from all acts of intimidation or reprisal against those who seek to cooperate or have cooperated with representatives of United Nations human rights bodies, or who have provided testimony or information to them; and

(b) Requested these representatives to include a reference thereto in their reports and invited the Secretary-General to submit to the Commission at its fifty-fifth session a report containing a compilation of any available information on alleged reprisals against such persons.

34. Pursuant to that resolution, therefore, the Working Group brings the above-mentioned incidents to the attention of the Commission on Human Rights so that it may take appropriate action having due regard for their gravity.

### 3. Follow-up to country visits and opinions of the Working Group

35. In its resolution 1998/74, the Commission on Human Rights requested those persons responsible for the Commission's thematic mechanisms to keep the Commission informed about the follow-up to all recommendations addressed to Governments in the context of the discharge of their mandates.

36. In response to this request, the Working Group has decided to address to the Governments of those countries it has visited, in due course, a follow-up letter with a copy of the relevant recommendations adopted by the Group and contained in the reports on its country visits. In this letter, the Working Group will request Governments to inform it of initiatives they have taken pursuant to the Group's recommendations, or to make such comments as they deem appropriate. Wherever relevant, the Working Group will also enclose copies of opinions adopted in respect of the Government concerned.

## C. Cooperation with the Commission on Human Rights

37. In its resolution 1998/41, the Commission on Human Rights invited the Working Group to ensure the implementation of its revised methods of work, in accordance with the relevant provisions of Commission resolutions 1996/28 and 1997/50.

38. The Working Group requests the Commission, as it has done in previous reports, to adopt a follow-up procedure for its opinions and recommendations, possibly with the participation of the Office of the High Commissioner for Human Rights.

39. Also in its resolution 1998/41, the Commission welcomed the fact that the Working Group had been informed of the release of many individuals whose situation had been brought to its attention. This year, the Group has been informed of the release of only 13 individuals whose cases had been examined.

40. In response to the Commission's interest in obtaining the release of long-term prisoners, the Working Group is requesting the Governments of Israel, Maldives and Viet Nam to arrange for prisoners who have been in detention for more than five years to be released. The Working Group is particularly concerned about the situation of Doan Viet Hoat, a Vietnamese citizen detained since 17 November 1990 although his deprivation of liberty was found to be arbitrary in opinions 15/1993 and 7/1994; the Group also refers to its opinion 27/1998, in which it concluded that Doan Viet Hoat's detention continues to be arbitrary.

41. The Working Group welcomes the Commission's request to the Secretary-General "to ensure that the Working Group receives all necessary assistance, particularly in regard to staffing and resources needed to discharge its mandate and notably with respect to field missions" (resolution 1998/41, para. 11 (b)). In this regard, the Working Group would like to inform the Commission that, since its establishment, it has considered itself privileged to have received such great dedication and cooperation from its single assistant, Mr. Isaac Bitter, who served from 1991 to 1997, and outstanding assistance from his successor, Mr. Markus Schmidt. However, the Group's work cannot be accomplished with only one assistant, given the complexity of the subjects on which it has to give an opinion. The Working Group considers that, in order to carry out its work more effectively, it requires at least one other full-time assistant and the help of two interns. It notes furthermore that numerous communications concerning the People's Republic of China, the examination of which was suspended pending the Group's visit to China, currently remain in abeyance.

42. In accordance with the request made by the Commission in its resolution 1998/19, paragraph 9, the Working Group has paid special attention to the situation of persons belonging to national or ethnic, religious and linguistic minorities. Membership of the militant Oromo minority in Ethiopia was one of the reasons for a case of deprivation of freedom, which the Working Group deemed arbitrary under category II of the principles applied in assessing the arbitrary nature of cases of deprivation of liberty (opinion 5/1998).

43. With regard to the request made by the Commission in its resolution 1998/31, paragraph 12, the Working Group has not been informed of any cases involving persons with disabilities or of any discrimination against such persons.

44. During its visit to Peru, the Working Group was particularly concerned at the situation of children and minors who have been deprived of their freedom, as can be seen from paragraphs 147 and 148 of the report on that mission (E/CN.4/1999/63/Add.2), and it is naturally ready to adopt measures in accordance with its mandate if it learns of other cases, as the Commission requested in its resolution 1998/39, paragraph 12. In its revised methods of

work, the Working Group has taken particular account of the provisions of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").

45. The Working Group shares the Commission's concern at the large number of persons deprived of their freedom for exercising the fundamental human right to freedom of opinion and expression, referred to in article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as can be seen from its previous reports (E/CN.4/1993/24, para. 9; E/CN.4/1994/27, para. 37; E/CN.4/1995/31, para. 27; E/CN.4/1996/40, para. 72). Indeed, it is estimated that, in many of the opinions adopted by the Working Group in relation to category II arbitrary detentions, the reason for the detention was the exercise of the human right to freedom of opinion and expression.

46. In the report on its mission to Peru, the Working Group has also taken particular pains to examine the consequences of the acts, methods and practices of the Sendero Luminoso and the Movimiento Revolucionario Tupac Amaru terrorist groups, endorsing the concerns expressed in Commission resolution 1998/47, paragraph 7, and in resolution 1998/73 on hostage-taking.

47. No cases of persons deprived of their freedom for being refugees or internally displaced have been brought to the attention of the Working Group but, should the situation arise, it is prepared to provide the High Commissioner for Human Rights with information for appropriate action, in accordance with the requests in Commission resolutions 1998/49, paragraph 11, and 1998/50, paragraph 14.

48. The Working Group has been incorporating a gender perspective in its reports since 1992, giving particular attention to the situation of women, as requested and repeated in Commission resolutions 1998/51 and 1998/52 and in resolution 1998/74, paragraph 5 (e).

49. The Working Group considers impunity to be one of the most serious human rights problems and a fundamental reason why human rights violations continue to be committed. In order to combat impunity it is necessary to strengthen judicial systems and the due process of law. The Working Group has been saying for a number of years that one of the factors underlying a large number of cases of arbitrary detention and the very existence of impunity is the operation of military tribunals. It has repeated its comments in this regard in paragraphs 178 and 179 of the report on its mission to Peru (see also chap. III.C of the present report). In so doing, the Working Group considers that it has responded to the concern expressed by the Commission in its resolution 1998/53 and that it has complied with the request contained in paragraph 8 of that resolution.

50. The Working Group has received no reports of persons cooperating with it being detained in the reporting period (1998), but it is giving particular attention to the concern expressed in resolution 1998/66.

51. The Commission's mandate to the Working Group to continue to study the situation of immigrants and asylum seekers subject to prolonged administrative detention is discussed in chapter II below.

## D. The mandate of the Working Group

52. Subsequent to the adoption of opinion 1/1998, the Government of Cuba addressed a letter to the Working Group, in which it formulated a number of comments on the mandate of the Group. The Working Group makes the following observations on these comments.

Report on the situation of human rights in Cuba by the Special Rapporteur of the Commission

53. The Government of Cuba argues that the fact that the Working Group took account of the report on the situation of human rights in Cuba by the Special Rapporteur (E/CN.4/1998/69) in one of its opinions, despite the fact that the mandate of the Special Rapporteur had ended during the previous session of the Commission, bordered on perversion of the course of justice, in the strictest technical sense of the term. The Working Group would like to remind the Government that expressions of this nature are not generally used in interactions between the Government and the Group. It further wishes to indicate to the Cuban Government that the events which were at the basis of opinion 1/1998 occurred on 16 July 1997, when the Special Rapporteur was still exercising his mandate.

54. The Working Group has done no more than comply strictly with the mandate, repeatedly given to it by the Commission, to coordinate with other Commission mechanisms. It is recalled here that, in its latest resolution on arbitrary detention, the Commission took note "of the importance that the Working Group attaches to coordination with other mechanisms of the Commission on Human Rights, with other relevant United Nations bodies and with treaty monitoring bodies".

55. It is a matter of record that the Working Group has done as the Commission asked it to do, with the same transparency it has demonstrated in the discharge of its mandate during the eight years of its existence: as stated in paragraph 4 of the opinion in question, "in a spirit of cooperation and coordination, it has also taken account of the report of the Special Rapporteur, prepared in pursuit of Commission on Human Rights resolution 1997/62 (E/CN.4/1998/69)".

Criteria used in the consideration of the cases

56. The Government of Cuba finds "unacceptable" the pre-eminence of a "recommendatory document of the United Nations (whatever its value 'as a common standard of achievement for all peoples and all nations', to quote the Preamble to the 1948 Declaration) over national legislation in force in any country. The United Nations is still very far from being a universal parliament empowered to impose some kind of homogenizing standard on its Member States without their consent, in this or any other sphere" (emphasis in original).

57. The question of the pre-eminence of the Universal Declaration of Human Rights over domestic legislation is not relevant to an interpretation of the mandate of the Working Group. This mandate, under resolution 1997/50, is "to investigate cases of deprivation of liberty imposed arbitrarily, provided that

no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned".

58. The Working Group has no doubt that the three categories defined as cases of arbitrary detention do in fact define cases of deprivation of liberty imposed arbitrarily. Because its mandate does not define what cases of deprivation of liberty are arbitrary, the Working Group suggested these three categories in 1991, and they have received widespread approval from the Commission, always without a vote, in every resolution on the subject since 1992. 1/

59. In principle every form of deprivation of liberty falls within the mandate of the Working Group. The exception to the competence of the Working Group is stated in clear and precise terms and applies only in cases where the following three circumstances coincide: (a) a "final decision" has been taken in the case; (b) that final decision was taken by "domestic courts"; and (c) the "final decision" taken by the "domestic courts" is consistent with domestic legislation and the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.

60. The point, then, is not whether the Universal Declaration of Human Rights prevails over the legislation of a State or vice versa. It is simply that, according to the letter of the mandate of the Working Group, a case of deprivation of liberty ceases to be arbitrary if it is consistent both with domestic legislation and with the relevant international standards set forth in the Declaration and in other relevant international instruments accepted by the State concerned. It is only necessary for it to be inconsistent with one of those criteria for the exception contained in resolution 1997/50, paragraph 15, to be inapplicable and for the deprivation of liberty to be deemed arbitrary.

Recommendations of the Working Group in its opinion on case 1/1998

61. The Government of Cuba describes the recommendations made in one of the opinions of the Working Group as "inadmissible", "inadmissible by reason of superfluity", and "not pertinent". In formulating the recommendations contained in the opinion in question (that the Government should take the necessary steps to correct the situation, in accordance with the standards and principles set forth in the Universal Declaration of Human Rights; that Cuba should take appropriate steps to become a State party to the International

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1/ In its note, the Government asserts its "unconditional agreement with category I; its acceptance of category II provided that the deprivation of liberty that has been ordered is in breach of its national legislation and its formally contracted international legal obligations; and its acceptance, also conditional, of category III, provided that all the remedies allowed in internal legislation to complain about such non-compliance with its national legislation and its international obligations (although not with non-binding standards) have been exercised and exhausted" (emphasis in original).

Covenant on Civil and Political Rights; and that it should consider the possibility of amending its legislation to bring it into line with the Declaration and the other relevant international instruments accepted by the State), the Working Group has merely acted in accordance with the provisions of resolution 1998/41, paragraph 5, in the hope that the Government of Cuba, in accordance with paragraph 6 (a) and (b), would feel encouraged "to pay attention to the recommendations of the Working Group concerning persons mentioned in its report who have been detained for a number of years" and "to take appropriate measures in order to ensure that ... legislation in these fields is in conformity with the relevant international standards applicable to the States concerned". In the same way, the Group considers that it has discharged the mandate given to it in resolution 1998/74, paragraph 3, to address recommendations to Governments. The Working Group would request the Government of Cuba to accede to the Commission's invitation to study carefully the recommendations addressed to it under thematic procedures.

## II. SITUATION REGARDING IMMIGRANTS AND ASYLUM SEEKERS

62. In its resolution 1997/50, the Commission on Human Rights requested the Working Group to devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy, and to include observations on this question in its report.

63. Taking into account the preliminary observations submitted to the Commission regarding the definition of the mandate, the applicable international and regional standards and the places of deprivation of liberty concerned (see E/CN.4/1998/44, paras. 28-42), as well as the experience gained from the first two field missions conducted in this area in September-October 1998 (see E/CN.4/1999/62/Add.3 and 4), the Working Group has set the following guidelines for the accomplishment of its mission.

### A. Scope

64. It follows from the above-cited resolution that the Working Group's mandate relates essentially to situations in which aliens, asylum seekers or immigrants, are deprived of liberty for the time necessary to consider their applications for admission into the territory concerned and, in the event of refusal, for the period preceding their expulsion as appropriate.

65. The Working Group, following the terminology used by the Commission, describes this form of deprivation of liberty as "custody" ("rétention") (see E/CN.4/1998/44, para. 38).

66. Measures assimilated with such custody are house arrest under the conditions set forth in deliberation 01 of the Working Group (see the Group's report for 1993, E/CN.4/1993/24, para. 20) and confinement on board a ship, aircraft, road vehicle or train. However, resolution 1997/50 does not cover the situation of aliens deprived of their liberty in connection with extradition proceedings or following prosecution or a criminal conviction, except in those cases where the offence under domestic law is related to illegal entry into the territory.

67. The Working Group also considers that its specific mandate does not include determining the lawfulness and conformity with international standards of procedures for granting asylum or conferring refugee status, or for permitting temporary residence where immigrants are concerned, unless they have a direct bearing on the juridical aspects of the custody and its possible arbitrary character.

68. The places of deprivation of liberty concerned may be places of custody situated in border areas, police premises, premises under the authority of a prison administration, ad hoc centres, so-called "international" or "transit" areas (ports or international airports), gathering centres or certain hospital premises (see E/CN.4/1998/44, paras. 28-41).

B. Criteria for determining whether or not the custody is arbitrary

69. In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees:

Guarantee 1: To be informed, at least orally, when held for questioning at the border, or in the territory concerned if he has entered illegally, in a language which he understands, of the nature of and grounds for the measure refusing admission at the border, or permission for temporary residence in the territory, that is being contemplated with respect to him.

Guarantee 2: Decision involving administrative custody taken by a duly authorized official with a sufficient level of responsibility in accordance with the criteria laid down by law and subject to guarantees 3 and 4.

Guarantee 3: Determination of the lawfulness of the administrative custody pursuant to legislation providing to this end for:

(a) The person concerned to be brought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality;

(b) Alternatively, the possibility of appealing to a judge or to such a body.

Guarantee 4: To be entitled to have the decision reviewed by a higher court or an equivalent competent, independent and impartial body.

Guarantee 5: Written and reasoned notification of the measure of custody in a language understood by the applicant.

Guarantee 6: Possibility of communicating by an effective medium such as the telephone, fax or electronic mail, from the place of custody, in particular with a lawyer, a consular representative and relatives.

Guarantee 7: To be assisted by counsel of his own choosing (or, alternatively, by officially appointed counsel) both through visits in the place of custody and at any hearing.

Guarantee 8: Custody effected in public premises intended for this purpose; otherwise, the individual in custody shall be separated from persons imprisoned under criminal law.

Guarantee 9: Keeping up to date a register of persons entering and leaving custody, and specifying the reasons for the measure.

Guarantee 10: Not to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations.

Guarantee 11: To be informed of the guarantees provided for in the disciplinary rules, if any.

Guarantee 12: Existence of a procedure for holding a person incommunicado and the nature of such a procedure, where applicable.

Guarantee 13: Possibility for the alien to benefit from alternatives to administrative custody.

Guarantee 14: Possibility for the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and specialized non-governmental organizations to have access to places of custody.

70. Where the absence of such guarantees or their violation, circumvention or non-implementation constitutes a matter of a high degree of gravity, the Working Group may conclude that the custody is arbitrary.

## III. CONCLUSIONS AND RECOMMENDATIONS

### A. The specificity of the Group's mandate

71. Since their establishment in 1967 (Economic and Social Council resolution 1235), the so-called "special" procedures have best reflected the concern of the United Nations to reaffirm its faith in basic human rights through the political impact that results from public debate of the human rights "situation" in countries under investigation. In the case of the "thematic" procedures, the references to the countries in which human rights abuses are taking place have the same impact. Furthermore, the organ which creates and renews or terminates the mechanism, and which takes action on the report of the expert or experts, is the one that has been charged by the United Nations with ensuring respect for human rights, and this lends a political meaning of the greatest importance to the resolutions adopted.

72. For this very reason, the resolutions of the Commission on Human Rights concerning the various situations that reveal a consistent pattern of violations of human rights (geographic or thematic) encourage the States investigated to take steps to improve the treatment of their subjects. Both the victims of human rights violations and non-governmental organizations have continually reiterated their support for these mechanisms.

73. In general, it is appreciated that the investigations of situations are entrusted to independent experts who in the exercise of their functions do not

depend on their Governments, an approach that has ensured objective analysis of the facts. Moreover, out of this same concern for objectivity, the rapporteurs and working groups have always used an adversarial procedure, hearing both the alleged victims and the State, thus making it possible for the reports to reflect each point of view.

74. Regrettably, these procedures of late have begun to be questioned and weakened, with some States even casting doubt on their usefulness. Such a conception may seriously undermine the interest of the United Nations in situations that reveal a consistent pattern of human rights violations.

75. The Working Group furthermore believes that its specific mandate for "investigating cases" requires a collegiate body, with the participation of experts from different legal backgrounds. The rendering of an "opinion", on a case-by-case basis, as to whether or not an instance of deprivation of liberty is arbitrary would not be feasible without a genuine plural discussion of the facts and interpretation of the domestic laws of all countries of the world.

### B. Immigrants and asylum seekers

76. In respect of the general guarantees from which immigrants and asylum seekers should be able to benefit, the Working Group refers to its observations in chapter II above, in particular under paragraphs 69 and 70.

77. The legal regime, as applied to immigrants and asylum seekers, in the two countries visited by the Working Group, the United Kingdom and Romania, leans in favour of those immigrants who are "genuine asylum seekers", a status that is to be determined by applying the test of whether such individuals seek to enter the country in fear of prosecution. Romanian law entitles the authorities to allow entry for humanitarian reasons. Cross border movements of people, a phenomenon characterized by its sheer physical manifestation, requires the international community to respond appropriately, by recognizing that the problem has a genuine human dimension.

78. The Working Group recommends that the problem of immigrants and asylum seekers be dealt with by setting out rational criteria for their entry and rehabilitation, and that their detention be resorted to only as a last available measure.

### C. Military justice

79. Once more the Working Group has been confronted with arbitrary acts committed by the military justice in numerous countries. The Working Group shares the reservations expressed in the report of the Special Rapporteur on the independence of judges and lawyers (see E/CN.4/1998/39/Add.1, para. 78) about General Comment No. 13 of the Human Rights Committee. The Special Rapporteur, Mr. Dato Param Cumaraswamy, states, "international law is developing a consensus as to the need to restrict drastically, or even prohibit, this practice".

80. In the light of the foregoing, the Working Group wishes to reiterate the recommendations it formulated in paragraphs 179 and 180 of the report on its mission to Peru (E/CN.4/1999/63/Add.2):

"A joint study which would be carried out with the participation of regional and universal international organizations and all bodies belonging to the United Nations system with a contribution to make, as well as of human rights and lawyers' and judges' organizations, and would lead to an intergovernmental conference aimed at eradicating this form of injustice, is a specific recommendation formulated by the Working Group."

"The Working Group is of the opinion that, if some form of military justice is to continue to exist, it should observe four rules:

(a) It should be incompetent to try civilians;

(b) It should be incompetent to try military personnel if the victims include civilians;

(c) It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime; and

(d) It should be prohibited imposing the death penalty under any circumstances."

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## Annex I

## STATISTICS

(Covering the period from January to December 1998. The figures given in parentheses are the corresponding figures from last year's report.)

A. Cases of detention in which the Working Group adopted an opinion regarding their arbitrary or not arbitrary character

1. Cases of detention declared arbitrary

| | Female | Male | Total |
|---|---|---|---|
| Cases of detention declared arbitrary falling within category I | 0 (0) | 12 (2) | 12 (2) |
| Cases of detention declared arbitrary falling within category II | 1 (0) | 14 (3) | 15 (3) |
| Cases of detention declared arbitrary falling within category III | 4 (0) | 28 (71) | 32 (71) |
| Cases of detention declared arbitrary falling within categories II and III | 0 (0) | 1 (4) | 1 (4) |
| Cases of detention declared arbitrary falling within categories I and II | 0 (0) | 1 (0) | 1 (0) |
| Total number of cases of detention declared arbitrary | 5 (0) | 56 (80) | 61 (80) |

2. Cases of detention declared not arbitrary

| Female | Male | Total |
|---|---|---|
| 0 (0) | 0 (1) | 0 (1) |

B. Cases which the Working Group decided to file

| | Female | Male | Total |
|---|---|---|---|
| Cases filed because the person was released, or was not detained | 3 (4) | 10 (8) | 13 (12) |
| Cases filed because of insufficient information | 2 (0) | 16 (1) | 18 (1) |

C. Cases pending

| | Female | Male | Total |
|---|---|---|---|
| Cases which the Working Group decided to keep pending for further information | 3 (0) | 7 (27) | 10 (27) |
| Cases transmitted to Governments on which the Working Group has not yet adopted an opinion | 10 (5) | 103 (72) | 113 (77) |

D. Total number of cases dealt with by the Working Group during the period January-December 1998

| Female | Male | Total |
|---|---|---|
| 23 (9) | 192 (198) | 215 (207) |

E. Cases of alleged detention transferred by the Working Group to other human rights mechanisms

| Female | Male | Total |
|---|---|---|
| 0 (0) | 1 (0) | 1 (0) |

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